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No. 59

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1942

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.,
Appellants,

vs.

ROSCOE C. FILBURN,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR THE APPELLEE ON RE-ARGUMENT

WEBB R. CLARK,
HARRY N. ROUTZOHN,
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Dayton, Ohio.

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ARGUMENT OF FACTS.

Counsel for the Government seem unwilling to concede that this Court acted advisedly when it ordered reargument "limited to the question whether the Act, in so far as it deals with wheat consumed on the farm of the producer, is within the power of Congress to regulate commerce."

In the opening paragraph of their brief they seek to evade the issue—stated in the Court order—by resorting to a vastly different premise for their argument.

In their statement of their premise, though, they are forced to include for consideration the fact that producers do consume—for feed, seed and food—a substantial portion of the wheat they individually produce on their respective farms.

Throughout the Record, as well as the two briefs filed in this Court by Counsel for the Government and our former brief filed in this Court, (which we earnestly request the Court to consider in connection with this brief) two indisputable facts are evident: (1) that of necessity wheat farming presupposes the consumption by the producer of a portion, and in many instances all, of the wheat he produces, and (2) that the Act as amended May 26, 1941, proscribes the use by the producer of his own wheat, though the product be used as food for himself and family, feed for his livestock and poultry, or seed for next year's crop.

These facts based our challenge of the May 26, 1941,

amendment as palpably unconstitutional. Counsel for the Government differed with us and willingly accepted the issue by stipulating that appellee, Filburn, raised wheat for consumption on the farm as well as for market, and said stipulations are silent as to any of his marketed wheat ever entering interstate commerce. (Record, pp. 18-19.)

Counsel for the Government now seek to evade the issue they so willing accepted heretofore by stating that the question they "feel" should be considered is "whether, as a means of regulating the amount of wheat marketed and the interstate price structure, Congress has the power to control the total available supply of wheat, including, of course, that which is consumed on the farm."

In presenting this hypothesis Counsel ignore other stipulated facts—facts prepared for the Record by the statisticians and economists of the Department of Agriculture—that wheat, unlike cotton, tobacco and rice, is not essentially an interstate commerce product; that it is impossible to trace the product, even when sold and delivered to one of our more than thirty thousand local elevators, into interstate shipment; that a substantial portion of the wheat harvested every year never enters the stream of commerce, either interstate or intrastate, and was grown and harvested, solely, for consumption on the farms where raised.

The wheat raised for consumption on the farm where produced is not *available for market*. Its availability is limited to its intended and necessary use as feed, seed

and food on the farm where produced. Therefore there does not enter into the equation "the amount of wheat marketed and the interstate price structure."

The declared intent and purposes of the Agricultural Adjustment Act of 1938 are to amply insure the "balanced *flow*" of the basic agricultural commodities—corn, wheat, tobacco, cotton and rice—and regulate the orderly *marketing* and the price of these commodities. The Act as originally enacted was to be enforced by the assessment of a penalty, payable by the buyer or the producer, at the time and place the commodities are sold.

This Court in *Mulford vs. Smith*, 307 U. S., 38, sustained the original enactment as constitutional, holding that the Act did not regulate production by assessing penalties at the time and place the commodity (tobacco) entered "*the throat of commerce*" and implying that production would be regulated if the penalties were applied prior to sale and delivery to the market. The penalty provisions relating to tobacco, cotton and rice remain the same as when the Act was originally enacted. The Act, its expressed intent and purposes, has been proved effective as to tobacco, cotton and rice. Obviously, as to them there has been, since 1938, a satisfactory "balanced flow," orderly marketing and a sustained price.

The penalty provisions as to corn and wheat were changed May 26, 1941, though no marketing quota for corn has been declared.

More than two years ago appellee, Filburn, and tens of thousands of wheat farmers throughout the Nation (wheat is grown in every State but Florida) seeded their

fields for the summer harvest of 1941. No marketing quotas for wheat had been declared since the original enactment in 1938. Appellee and the other wheat farmers who seeded more than their allotments shared with the Secretary of Agriculture the belief that the war then raging in Europe would cause a demand for increased production of wheat and all other farm commodities.

Foreseeing this increased production, and frankly admitting his encouragement of it, the Secretary of Agriculture on May 9, 1941, (which was after the 1941 wheat harvest began in some of the States) declared a wheat marketing quota for 1941. At that time the penalty provisions, prescribing a penalty of fifteen cents per bushel on all wheat *marketed*, were still unchanged. The change came on May 26, 1941, effectually "freezing" every bushel of wheat harvested by every individual farmer who had exceeded his acreage allotment when he planted his wheat in the fall of 1940.

In the light of these facts, and many more which could be cited, all of which appear in the Record, the Court, we assume, will take judicial notice of what is commonly known to have transpired since said amendment, in determining whether the present penalty provisions on wheat do not regulate production rather than effect, fictitiously, the balanced flow, orderly marketing and interstate price structure of the product.

Considering that all of the wheat harvested in 1941 by appellee and all others who exceeded their allotments has been withheld from the market, and has not been used or consumed in any manner, and the fact that the Secretary

of Agriculture did not use his granted authority to remedy any adverse conditions, if any have existed, we conclude that the Secretary does not share the opinion of his eminent counsel that this frozen wheat has an effect upon interstate commerce and the price structure. That portion of the "frozen" harvests of 1941 (and 1942?) which was purposely raised for the market obviously was not by the Secretary considered "available for the market" to the extent that its retention by the producers seriously affected the "balanced flow," the orderly marketing or the interstate price structure. With much less vehemence can it be asserted that the large though now frozen quantity of wheat harvested in 1941 (and 1942), which was grown by the wheat farmers of the nation necessarily for their feed, seed and food, affected in any appreciable degree the aforesaid "balanced flow," the orderly marketing or the interstate price structure. If at any time it did affect the "balanced flow," et cetera, the Secretary undoubtedly would have exercised his powers under the act.

Whatever reasoning may be provoked by the above, the indisputable facts remain that a vast amount of the frozen 1941 (and 1942) harvests was raised and was needed for feed, seed and food on the farms where it was produced; that none of it can plausibly be considered available for market; and that by depriving the farmers of the use of their own product, compelling them to go into the market and purchase what they need for their own consumption, is an unwarranted regulation of production; deprives the producer of his right to use and

enjoy the fruits of his own labor; and is violative of the Constitution.

ARGUMENT OF LAW.

The cases of *United States vs. Butler*, 297 U. S., 1, and *Mulford vs. Smith*, 307 U. S., 38, are the only two cases decided by this Court pertinent to the issue now up for reargument. These we have discussed in our former brief filed in this Court.

Though Government Counsel have cited numerous other cases, the cited cases have but one point in common, viz., the control of intrastate commerce if and when it is found to affect interstate commerce. With these cases we can agree wholeheartedly, and without detracting one iota from our argument, for neither intrastate nor interstate commerce, nor a commingling of the two, is here concerned. The wheat that the farmer may consume on his own farm as feed, seed or food at no time moves into commerce between the States nor into intrastate channels —because it is never marketed. Yet Government Counsel insist that wheat used on the farm for the farmer's own purposes is in competition with commercial feeds and seeds and comes, therefore, under the ruling of the case of *United States vs. Wrightwood Dairy Company*, 315 U. S., 110.

Analyzing the *Wrightwood Dairy Company* case, it can be readily seen that Government Counsel have jumped to a conclusion at which this Court never arrived. Nowhere in that case was it said or implied that the original producer of the milk, from whom the Wrightwood Dairy purchased, could not use that milk on his own farm which

he did not sell to the Dairy Company, either as food for himself and family or for his livestock. The Court went no further than to regulate the "middleman" in his commercial transactions. It cannot be said that commerce, at least as we commonly know it, and without esoteric connotations, entered the picture in that case until an exchange of goods (milk) for money occurred. No more does commerce in the accepted meaning enter the picture in the present case until the wheat, via a sale, trade, bargain or contract (or an intention to enter into such an activity as manifested by shipment) exchanges hands and begins a movement over which the original producer no longer has control—in other words, until it is marketed. In the case of wheat used for feed, seed and food on the farm there is not even the intention to move it, either intrastate or interstate. It remains static.

To say that farmers by consuming their excess wheat as feed, seed or food, are competing with commercial products, is an argument too absurd to be taken seriously. For example, because A manufactures an X radio A cannot use an X radio in his own home but must buy a Y radio in order that Y may continue in business—and, of course, Y for his own home use must buy an X radio to keep A in business. Neither party can have the benefit or use of his own product. Certainly the doctrine expounded in the *Wrightwood Dairy Company* case was never meant to create such an anomalous situation.

The case of *Cloverleaf Butter Company vs. Patterson*, 315 U. S., 148, can be briefly disposed of. The production restricted in that case was the production of an

adulterated processed food bringing such production under the federal police power. The issue in that case, moreover, was whether a state law had precedence over a federal statute, and the decision did not revolve on the question to be considered herein. The opinion, however, states:

> "But once the material was definitely *marked for commerce* by acquisition of the manufacturer it passed into the domain of federal control."

In no sense can it be said that the production of the butter acquired from the producer for processing was restricted, but only that portion which was manufactured after acquisition by the manufacturer from the original producer. This was done in the interests of health, and not then until it was "marked for commerce." The presumption naturally would follow that the manufacturer might destroy his own product without penalty before so marked, and thus forestall federal regulation.

The so-called *Shreveport* case, 234 U. S., 342, cited by Government Counsel, announces a now familiar principle and one with which we have no quarrel; for, as pointed out in the *Wrightwood Dairy* case (*supra*) the theory is that some form of commerce must materialize before the powers of the interstate commerce clause can be invoked. In the question now presented for reargument, as we have pointed out, commerce in the accepted sense of the word has not taken place. The wheat on the farm grown for feed, seed and food is still under the control of the farmer and has not yet moved into any channel of trade. It is still private property until the farmer disposes of

it in some manner. See *Santa Cruz Co. vs. National Labor Relations Board*, 303 U. S., 453, at page 466, where Mr. Chief Justice Hughes said:

> "It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our Constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation vs. United States*, 295 U. S., 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' Id., 554.
>
> To express this essential distinction 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close' and 'substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as 'interstate commerce,' 'due process,' 'equal protection.' In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion."

Consequently we can agree with the conclusions arrived at in the *Wrightwood* and *Shreveport* cases and still recognize the fact that there are limitations upon the power of the federal government to intervene in cases where the relationship of the activity in question is not close and substantial to interstate commerce. We submit that where "commerce" has yet to begin, the relationship to interstate commerce is not only indirect and remote but has not yet been called into existence.

The case of *United States vs. Darby*, 312 U. S., 100, confirms our belief in the principles we have announced above. On page 115 of that decision Mr. Justice Stone said:

> "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the constitution places no restriction and over which the courts are given no control * * *. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. * * *"

It is our contention that the amendment of May 26, 1941, does infringe upon a constitutional prohibition—the unwarranted invasion of a private right of property.

To say that feed, seed and food consumed on the farm where it has been raised is a form of competition with commercial products is a *reductio ad absurdum* of the theory of competition. On the projected "mathematical formula" of Government Counsel, we might all well starve to death in order to keep alive the struggle for existence. But on page 113 of *United States vs. Darby* (*supra*) Mr. Justice Stone laid down the distinction upon which we have dwelt. He said:

> "*While manufacturing is not of itself interstate commerce* the *shipment* of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress indubitably a regulation of the commerce." (Italics supplied.)

The emphasis is on the "shipment" of the manufactured goods into the channels of commerce—interstate or intrastate, or both; but until such movement occurs there is no cause to invoke the power of the interstate commerce clause.

The cases that we have been at some length distinguishing from the present case are deemed by us the principal ones which Government Counsel have cited. Of the many others cited, if the distinctions hold good for the ones we discussed they will hold good for the others. None of them—and this can be said with firm conviction—go so far in the extension and application of the Commerce Clause of the Constitution as Government Counsel now ask this Court to go. All of the decisions of this Court in the case cited recognize, respect and uphold a limitation—a constitutional limitation—upon the power

of Congress to regulate activities which in purpose and effect are separate and apart from Commerce.

In conclusion, we refer the Court to the decision of *Labor Board vs. Jones & Laughlin*, 301 U. S., 1, cited by Government Counsel. We deem it unnecessary to point the distinction between that case and the instant one, other than to state that the consumption of the wheat "on the farm of the producer" is not a commercial activity, intrastate or interstate, and does not burden, obstruct, or affect the "balanced flow," the "orderly marketing" or the "price structure" of wheat in interstate commerce sufficiently to justify the application of the Commerce Clause.

In *Labor Board vs. Jones & Laughlin*, at page 37, speaking through Mr. Chief Justice Hughes, this Court warns the Congress against a too liberal exercise of its power to invoke the Commerce Clause, stating:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

To extend the Commerce Clause to the degree advocated by Government Counsel in this case would not only effectually approach a centralized government but could eventually lead to absolutism by successive nullifications of all Constitutional limitations. The requested misap-

plication of the Commerce Clause to the instant case we confidently believe this Court will never sanction.

Respectfully submitted,

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